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Good Intentions, Bad Results, and Ineffective Redress: The Story of the No Fly and Selectee Lists and a Suggestion for Change

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GOOD INTENTIONS, BAD RESULTS, AND INEFFECTIVE REDRESS: THE STORY OF THE NO FLY AND SELECTEE LISTS AND A SUGGESTION FOR CHANGE

ERIC HEDLUND*

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I. INTRODUCTION

WATCH LISTS HAVE BECOME the sustenance of national security. Although the U.S. government has employed watch lists in many contexts in our history, from the Attorney General's List of Subversive Organizations to the terrorist watch lists of today, there has been a significant expansion in recent years.¹ Watch lists can be a useful means of monitoring or restricting potentially dangerous individuals.² However, they can also significantly impede lawful activity.³ The story of Rahinah Ibrahim is a quintessential example of such an impediment.

Rahinah Ibrahim is a Malaysian citizen who was in the United States from 2001 to 2005 on a valid student visa studying to obtain her doctoral degree at Stanford University.⁴ On January 2, 2005, Ibrahim was to travel to Kuala Lumpur, Malaysia, to present her doctoral research, but when she arrived at the airport, officials informed her that she could not board because her name was on the No Fly List.⁵ Local police, at the behest of the Transportation Security Administration (TSA), then handcuffed and detained her.⁶ After approximately two hours, the FBI requested her release, and she was told that her name would no longer be on the No Fly List.⁷ The next day Ibrahim again attempted to board a flight for Malaysia but was again told her

¹ See Robert Justin Goldstein, *The Attorney General's List of Subversive Organizations: A Sad Lesson from American History*, HIST. NEWS NETWORK (Jan. 30, 2014, 10:03 PM), <http://hnn.us/article/59446>; Jason Ryan, *No-Fly List Has Doubled in Size and Will Get Bigger, Say Gov't Officials*, ABC NEWS (Mar. 10, 2010), <http://abcnews.go.com/Blotter/fly-list-doubled-size-bigger-govt-officials/story?id=10065231&singlePage=true>.

² U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-476, TERRORIST WATCHLIST: ROUTINELY ASSESSING IMPACTS OF AGENCY ACTIONS SINCE THE DECEMBER 25, 2009 ATTEMPTED ATTACK COULD HELP INFORM FUTURE EFFORTS 27–28 (2012).

³ See Lizette Alvarez, *Meet Mikey, 8: U.S. Has Him on Watch List*, N.Y. TIMES, Jan. 3, 2010, at A1; Rachel L. Swarns, *Senator? Terrorist? A Watch List Stops Kennedy at Airport*, N.Y. TIMES (Aug. 20, 2004), www.nytimes.com/2004/08/20/national/20flight.html.

⁴ Second Amended Complaint at 9, Ibrahim v. Dep't of Homeland Sec., No. C06-0545 WHA (N.D. Cal. 2009).

⁵ Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 987 (9th Cir. 2012).

⁶ *Id.*

⁷ *Id.*

name was on the No Fly List; however, she was eventually able to board the plane and travel to Malaysia, albeit with enhanced security screenings along the way.⁸

On March 10, 2005, Ibrahim attempted to return to the United States from Malaysia to finish her doctoral degree at Stanford University.⁹ At the airport, the ticketing agent refused to allow her to board a plane to the United States until she obtained clearance from the U.S. embassy.¹⁰ She subsequently attempted to clear her name by submitting a request to the TSA's "Passenger Identity Verification Program."¹¹ But the TSA only responded after she filed a lawsuit against the United States, and in its response, the TSA only stated that "[if] it has been determined that a correction to the records is warranted, these records have been modified."¹² Ibrahim has never been allowed back into the United States.¹³ She is still fighting for that opportunity.¹⁴

The immediate concern for Ibrahim is how to get off the No Fly List. The larger question that we, as Americans, should be asking ourselves is what should nonresident aliens like Ibrahim be able to do to challenge their name being on such a list. The latter question is the focus of this article. The courts and commentators have approached the problem of watch lists generally from a variety of angles, such as increasing the level of bureaucratic efficacy, providing due process rights and potentially other constitutional rights to individuals on the lists, or extending the Privacy Act of 1974 to such situations.¹⁵ Likewise,

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 987–88 (The Passenger Identity Verification Program was a predecessor program to the Department of Homeland Security's Traveler Redress Inquiry Program).

¹² *Id.* at 988 (quotation marks omitted) (The holding of the court will be discussed in Part IV).

¹³ *Id.* at 987.

¹⁴ The Associated Press, *Trial Begins in Legal Challenge to No-Fly List*, USA TODAY (Dec. 2, 2013, 8:51 PM), <http://www.usatoday.com/story/news/nation/2013/12/02/professor-no-fly-trial/3822151/>.

¹⁵ See, e.g., *Ibrahim*, 669 F.3d at 983 (finding that aliens who establish a "significant voluntary connection" with the United States may assert constitutional claims under at least the First and Fifth Amendments); Maxim Brumbach, *Are You on the List? Dispelling the Myth of a Total Exemption From the Privacy Act's Civil Remedies in Shearson v. DHS*, 81 U. CIN. L. REV. 1027 (2013) (advocating either expanding the Privacy Act of 1974 by limiting exempted agency activities or enacting other privacy-centric legislation); Peter M. Shane, *The Bureaucratic Due Process of Government Watch Lists*, 75 GEO. WASH. L. REV. 804 (2007) (proposing a

the Department of Homeland Security (DHS) has instituted its own redress procedure called the Traveler Redress Inquiry Program (TRIP).¹⁶ But in many cases, the TRIP procedures are woefully inadequate.¹⁷

This article attempts to propose a framework that lies somewhere between the limited review provided under the DHS's redress procedures and the expansive protections of the Constitution's Due Process Clause. This article frames the suggested model on the process the State Department currently uses to designate an organization as a foreign terrorist organization.¹⁸ While this model has some drawbacks and deficiencies, it is virtuous in that it offers greater transparency and provides for both redress within the agency and the ability for judicial review.¹⁹ Striking the right balance between watch-listing procedures and national security is key; it will increase not only the fairness and legitimacy but also the efficacy of the lists.²⁰ The current system lacks these fundamental aspects.²¹

In Part II, this article will discuss the historical develop of the watch lists, the current legal structure, the process for adding individuals to the TSA Selectee and No Fly Lists, and the current method for challenging one's inclusion on these lists. Part III will discuss the need for a change, and Part IV will discuss options suggested by commentators and the method used by the Ninth Circuit. Lastly, Part V will discuss the alternative framework this article proposes.

fundamental fairness approach to the front-end watch-list procedures and a varied approach to challenging inclusion to a watch list based on the reasons for being on the watch list and the implementation of the suggested front-end procedures).

¹⁶ *DHS Traveler Redress Inquiry Program (DHS TRIP)*, DEPARTMENT HOMELAND SECURITY, www.dhs.gov/dhs-trip (last visited Nov. 4, 2013 at 10:01 PM).

¹⁷ See OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., PUB. NO. OIG-09-103, EFFECTIVENESS OF THE DEPARTMENT OF HOMELAND SECURITY TRAVELER REDRESS INQUIRY PROGRAM 33-52 (2009) [hereinafter OIG, EFFECTIVENESS OF TRIP].

¹⁸ See Designation of Foreign Terrorist Organizations, 8 U.S.C. § 1189 (2012).

¹⁹ See *id.*

²⁰ See Anya Bernstein, *The Hidden Costs of Terrorist Watch Lists*, 61 BUFF. L. REV. 461, 461-65 (2013).

²¹ See OIG, EFFECTIVENESS OF TRIP, *supra* note 17, at 79-90.

II. STAGE SETTING

A. HISTORICAL BACKDROP

Before 9/11, the Federal Aviation Administration (FAA) was responsible for aviation security.²² Congress had tasked the FAA with the conflicting mission of “regulating the safety and security of U.S. civil aviation while also promoting the civil aviation industry.”²³ The FAA promulgated rules and regulations that it required the aviation industry to implement.²⁴ Its scheme aimed to create multiple layers of prevention, including passenger prescreening and checking passenger names against the FAA’s No Fly List.²⁵ However, despite calls for increased sharing of watch lists among government agencies, the FAA’s No Fly List generally did not contain information from the Federal Bureau of Investigation’s (FBI), Central Intelligence Agency’s, or State Department’s watch lists.²⁶ In fact, the FAA’s No Fly List contained only twelve names as of 9/11 while other government watch lists contained thousands of names.²⁷

The situation began to change after 9/11, albeit in fits and starts. The newly formed TSA²⁸ took over responsibility for the aviation security,²⁹ and interagency sharing of watch list information became a larger focus.³⁰ The Aviation and Transportation Security Act provided the TSA with broad powers to identify and counteract potential threats of terrorism and risks to airline safety.³¹ Under this authority, the TSA issued Security Directives

²² NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 82 (2004) [hereinafter 9/11 COMM’N REPORT].

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ See Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified as amended in scattered sections of 49 U.S.C.). This Act created the Transportation Security Administration (TSA) under the Department of Transportation and tasked it with, among other things, aviation security. *Id.* The Homeland Security Act of 2002 moved the TSA under the Department of Homeland Security (DHS). Pub. L. No. 107-296, § 203, 116 Stat. 2135 (2002) (codified at 6 U.S.C. § 203 (2012)).

²⁹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-03-322, INFORMATION TECHNOLOGY: TERRORIST WATCH LISTS SHOULD BE CONSOLIDATED TO PROMOTE BETTER INTEGRATION AND SHARING 12–13 (2003) (explaining which agencies are responsible for each government watch list).

³⁰ *Id.* at 4.

³¹ Aviation and Transportation Security Act § 101.

that created two lists: the No Fly and Selectee Lists.³² The TSA independently operated these lists until 2003.³³ In 2003, President Bush issued Homeland Security Presidential Directive 6, which, among other things required the Attorney General to “establish an organization to consolidate the Government’s approach to terrorism screening”³⁴ Pursuant to this directive, the Attorney General established the Terrorist Screening Center (TSC), which created, and maintains, the consolidated terrorist watch list called the Terrorist Screening Database (TSDB).³⁵

B. THE CURRENT LEGAL STRUCTURE, THE NOMINATION
PROCESS, AND WHAT HAPPENS TO THOSE
ON WATCH LISTS

The TSC maintains the TSDB by evaluating nominations from the FBI and National Counter Terrorism Center (NCTC).³⁶ Homeland Security Presidential Directive 6 in conjunction with Homeland Security Presidential Directives 11 and 24 permit the TSDB to “contain information about individuals known or suspected to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism and terrorists activities.”³⁷ The FBI and NCTC are to apply a “reasonable-suspicion standard to determine which individuals are appropriate for inclusion in the TSDB.”³⁸ Once the FBI or NCTC makes this

³² TRANSP. SEC. ADMIN., PRIVACY IMPACT ASSESSMENT FOR THE TSA TRAVELER IDENTITY VERIFICATION PROGRAM 2 (2006) [hereinafter TSA, PRIVACY IMPACT ASSESSMENT FOR TIVP]; Declaration of Lee S. Longmire ¶¶ 6–8, *Green v. Transp. Sec. Admin.*, 351 F. Supp. 2d 1119 (W.D. Wash. 2005) (No. CV 04-0763Z), *available at* <http://hasbrouck.org/documents/nofly/exhibitA-Longmire.pdf>. The no-fly list existed prior to the creation of the TSA; the FAA maintained a no-fly list but used it sparingly. See 9/11 COMM’N REPORT, *supra* note 22, at 82 (2004).

³³ TSA, PRIVACY IMPACT ASSESSMENT FOR TIVP, *supra* note 32, at 2.

³⁴ Homeland Security Presidential Directive/HSPD-6-Integration and Use of Screening Information To Protect Against Terrorism, 2 PUB. PAPERS 1174–75 (Sept. 16, 2003), *available at* <http://www.gpo.gov/fdsys/pkg/PPP-2003-book2/pdf/PPP-2003-book2-doc-pg1174.pdf>.

³⁵ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-476, *supra* note 2, at 6, 36.

³⁶ *Id.* The NCTC receives nominations from the Central Intelligence Agency, Department of State, FBI, and other executive branch agencies. *Id.* The FBI nominates domestic terrorists directly to the TSC, but the FBI refers its nominations of international terrorists to the NCTC. OFFICE OF INSPECTOR GEN., U.S. DEP’T OF JUSTICE, PUB. NO. 09-25, THE FEDERAL BUREAU OF INVESTIGATION’S TERRORIST WATCHLIST NOMINATION PRACTICES 4–5 (2009) [hereinafter OIG, FBI WATCHLIST PRACTICES].

³⁷ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-476, *supra* note 2, at 7.

³⁸ *Id.* “[T]o meet the reasonable-suspicion standard, the nominator shall consider the totality of information available that, taken together with rational infer-

determination, they send the appropriate information to the TSC, which then evaluates the nominations for completeness and accuracy, and, if appropriate, places the individual on the TSDB.³⁹

Numerous federal agencies utilize the TSDB.⁴⁰ However, agencies generally do not use the entire list, but rather a subset of the list applicable to their particular mission.⁴¹ The TSA's No Fly and Selectee Lists are an example of such subsets.⁴² These lists "are intended to prevent specific categories of terrorists from boarding commercial aircraft or subject these terrorist to secondary screening prior to boarding, and are not for use as law enforcement or intelligence-gathering tools."⁴³ The No Fly List prohibits listed individuals from boarding an aircraft that will fly within the United States or to the United States,⁴⁴ while the Selectee List subjects the listed travelers to enhanced screening before boarding a flight.⁴⁵ Travelers on the Selectee List will not be able to print boarding passes online or at kiosks and will have to show identification to a ticketing agent to get a boarding pass.⁴⁶ It is important to note that "the Selectee List is not a default for those who do not qualify for inclusion on the No Fly List . . ."—that is, the TSA employs different criteria for each list.⁴⁷

The TSA promulgates rules and regulations for utilizing the lists under the authority granted in the Aviation and Transportation Security Act and Intelligence Reform and Terrorism Pre-

ences from that information, reasonably warrants a determination that an individual is known or suspected to be or have been knowingly engaged in conduct constituting, in preparation for, in aid of, or related to terrorism or terrorists activities." *Id.* n.18.

³⁹ *Id.* at 7.

⁴⁰ OIG, FBI WATCHLIST PRACTICES, *supra* note 36, at vii–ix.

⁴¹ See Letter from Arthur M. Cummins, II, Exec. Assistant Dir., Nat'l Sec. Branch, Fed. Bureau of Investigation, to Carlton I. Mann, Assistant Inspector Gen. for Inspections, U.S. Dep't of Homeland Sec. (Aug. 17, 2009), in OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., PUB. NO. OIG-09-103, EFFECTIVENESS OF THE DEPARTMENT OF HOMELAND SECURITY TRAVELER REDRESS INQUIRY PROGRAM 126 (2009).

⁴² U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-476, *supra* note 2, at 41 n.1.

⁴³ OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., PUB. NO. OIG-09-64, ROLE OF THE NO FLY AND SELECTEE LISTS IN SECURING COMMERCIAL AVIATION 11 (2009) [hereinafter OIG, ROLE OF WATCH LISTS].

⁴⁴ OIG, EFFECTIVENESS OF TRIP, *supra* note 17, at 91.

⁴⁵ *Id.* at 91–92.

⁴⁶ *Id.*

⁴⁷ OIG, ROLE OF WATCH LISTS, *supra* note 43, at 11.

vention Act of 2004.⁴⁸ In 2009, the TSA began to implement the latest iteration of these rules under a program called Secure Flight, which provides a multi-step process for screening passengers.⁴⁹ Secure Flight first requires airlines to submit passenger information to an automated matching tool.⁵⁰ The matching tool compares passenger information against the No Fly and Selectee Lists, and potentially other watch lists if circumstances dictate added screening for a particular flight or airport.⁵¹ TSA staff manually reviews potential matches generated by the automated system for accuracy.⁵² Depending on the results, the TSA will then instruct the airline to either issue the boarding pass in the usual manner, identify the individual for enhanced screening, or deny the individual service.⁵³

The Intelligence Reform and Terrorism Prevention Act of 2004 and Implementing Recommendations of the 9/11 Commission Act of 2007 also require the DHS and the TSA to provide a means of redress for impacted passengers.⁵⁴ To this end, the DHS currently operates the TRIP system.⁵⁵

C. DHS'S REDRESS APPROACH: FIGHTING BLIND

The DHS established TRIP in 2007 to provide a "one-stop traveler redress process for coordinating the review, adjudication, and response to traveler redress requests."⁵⁶ Before TRIP, redress-seekers sent requests to each agency individually.⁵⁷ Often this resulted in the redress-seeker having to spend much time and energy figuring out which agency was able to resolve the issue.⁵⁸ Conversely, TRIP provides a centralized portal for receiving inquiries and directing them to the appropriate agen-

⁴⁸ TSA, PRIVACY IMPACT ASSESSMENT FOR TIVP, *supra* note 32, at 2.

⁴⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-476, *supra* note 2, at 41-44. The TSA implemented Secure Flight to comply with a mandate in the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, to assume watch list passenger comparison responsibilities from the airlines. TRANSP. SEC. ADMIN., PRIVACY IMPACT ASSESSMENT FOR THE SECURE FLIGHT PROGRAM 3 (2008) [hereinafter TSA, PRIVACY IMPACT ASSESSMENT FOR SFP].

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² OIG, EFFECTIVENESS OF TRIP, *supra* note 17, at 49.

⁵³ TSA, PRIVACY IMPACT ASSESSMENT FOR SFP, *supra* note 49, at 3.

⁵⁴ OIG, EFFECTIVENESS OF TRIP, *supra* note 17, at 7-8.

⁵⁵ *Id.* at 8.

⁵⁶ *Id.* at 3. The Departments of State, Justice, and Homeland Security support this program with funds and personnel. *Id.*

⁵⁷ *Id.* at 16-17.

⁵⁸ *Id.* at 16.

cies to evaluate and make a determination about that individual's watch-list status.⁵⁹ It does this by replacing the five independent redress systems that five separate agencies operated with one system.⁶⁰

According to the DHS's TRIP website, individuals who have experienced delays during or been denied airline boarding, port entry, or border crossing, or individuals who have been repeatedly subjected to enhanced screening, should file a redress inquiry.⁶¹ The inquiry form requests information about the individual's travel experience and biographical information, including a copy of a passport or other government issued identification.⁶² Once an individual files a redress inquiry, TRIP forwards it to the appropriate agency for review and assigns a control number.⁶³ The control number may assist with future airline travel and allows the individual to check the redress-request status online.⁶⁴

After the respective agency investigates the inquiry and takes appropriate action, if any, TRIP sends a letter to the individual that is "designed to prevent recipients from learning whether they are the subject of an active law enforcement investigation or a terrorist watch-list record."⁶⁵ The letters provide no details about the reason for the traveling troubles or about what actions, if any, the agency took to resolve the redress-seeker's issues.⁶⁶

III. THE NEED FOR CHANGE

As of 2009, the TSDB had 1,183,447 entries on it, comprising about 400,000 unique individuals.⁶⁷ The terrorist watch lists, and

⁵⁹ *Id.* at 11-13.

⁶⁰ The following agencies or programs operated independent redress programs prior to TRIP: TSA, U.S. Customs and Border Protection, DHS's Office for Civil Rights and Civil Liberties, DHS's U.S. Visitor Immigrant Status Indicator Technology program, and Department of Justice's Terrorists Screening Center. *Id.* at 3.

⁶¹ *DHS Traveler Redress Inquiry Program (DHS TRIP)*, *supra* note 16.

⁶² *Id.*

⁶³ OIG, EFFECTIVENESS OF TRIP, *supra* note 17, at 9-13.

⁶⁴ *DHS Traveler Redress Inquiry Program (DHS TRIP)*, *supra* note 16. DHS also claims this redress number will assist in preventing future misidentifications. *Id.*

⁶⁵ OIG, EFFECTIVENESS OF TRIP, *supra* note 17, at 90.

⁶⁶ *Id.* at 89.

⁶⁷ OIG, FBI WATCHLIST PRACTICES, *supra* note 36, at 1 & n.40. Individuals may have multiple identifications on the list, such as aliases. *Id.* On average, each individual has two entries on the list. *Id.*

the No Fly List in particular, are expanding rapidly.⁶⁸ At the time of 9/11, the FAA's No Fly List had only twelve names it.⁶⁹ However, in recent years that number has increased exponentially.⁷⁰ For instance, the No Fly List doubled after the December 2009 "underwear bomber" attack.⁷¹ According to recent estimates, the No Fly List contains 21,000 names, including about 500 Americans.⁷² The exponential growth is concerning given the deficiencies and drawbacks of the watch lists, such as inadequate quality control procedures that diminish the lists' efficacy; the imposition of institutional costs, societal restructuring costs, and immense personal costs on the listed individuals; and the lack of an effective redress mechanisms for those individuals.

A. QUALITY CONTROL ISSUES PLAGUE EFFICACY

The efficacy of the TSDB depends on the quality of the information contained within it—that is, good information gets better results. In a field where bad results can have disastrous consequences, the government should continually strive for improvements in efficacy. But quality control issues plague the watch lists.⁷³

For example, the Department of Justice's Inspector General found that FBI agents often do not follow watch-listing guidelines.⁷⁴ The FBI is one entity responsible for nominating, modifying, and requesting the removal of individuals from the TSDB.⁷⁵ In a report reviewing the FBI's watch-listing procedures, the Inspector General found that an FBI agent's priorities, rather than merit, dictated whether the agent timely

⁶⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-476, *supra* note 2, at 14; *see also* OIG, FBI WATCHLIST PRACTICES, *supra* note 36, at 1 & n.40 (explaining that there are approximately 400,000 distinct individuals on the consolidated watch list and that the FBI has nominated more than 68,000 identities to the list since its inception).

⁶⁹ 9/11 COMM'N REPORT, *supra* note 22, at 82 (2004).

⁷⁰ OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE, PUB. NO. 07-41, FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER, at iii (2007) [hereinafter OIG, TSC AUDIT].

⁷¹ *Factsheet: The ACLU's Challenge to the U.S. Government's "No Fly List"*, AM. CIV. LIBERTIES UNION (Jan. 6, 2014, 7:22 PM), <https://www.aclu.org/national-security/factsheet-aclus-challenge-us-governments-no-fly-list>.

⁷² *Id.*

⁷³ OIG, FBI WATCHLIST PRACTICES, *supra* note 36, at vi-x.

⁷⁴ *Id.*

⁷⁵ *Id.*

removed an individual from the watch list.⁷⁶ And it found that nearly 72% of all removals from 2006 to 2008 were untimely.⁷⁷ In fact, the removal of one individual took 589 days.⁷⁸ Having outdated or incorrect information in lists diminishes the ability of counterterrorism officials to recognize terrorists' plots and capture potential perpetrators before an attack. Because the TSDB entries populate the No Fly and Selectee Lists,⁷⁹ the problems with the TSDB carry over to those lists as well.

Some proponents of the watch lists, however, argue that a dragnet approach is proper.⁸⁰ Under such an approach, the more people you have on the list the more likely you are to catch an actual terrorist.⁸¹ A high rate of false positives (i.e., individuals designated to a watch list who in fact do not have terroristic intentions) is the cost you pay for a low rate of false negatives (i.e., individuals not designated to a watch list who in fact do have terroristic intentions), and this trade off is worth it given the cost of a false negative may be a 9/11-type event.⁸² But this argument depends on the adequacy of the criteria used for selecting risky individuals; that is, a dragnet approach only works if it is sweeping up the right types of individuals.⁸³

The legitimacy of the government's criteria for selecting nominees to a watch list is unclear.⁸⁴ A Government Accountability Office (GAO) report found that "no entity is routinely assessing government-wide issues, such as how the changes have impacted agency resources and the traveling public, whether watch-list

⁷⁶ See *id.* at 36–45. The inconsistent adherence to procedures is not isolated to the removal process but also extends to the nomination and modification of identities. *Id.* at x–xv.

⁷⁷ *Id.* at 38.

⁷⁸ *Id.* at 40.

⁷⁹ OIG, *ROLE OF WATCH LISTS*, *supra* note 43, at 9. While the No Fly and Selectee List "have their own minimum substantive derogatory criteria requirements," they are still derivative lists that depend on the quality of the information in the TSDB. *Id.*

⁸⁰ SUSAN N. HERMAN, *TAKING LIBERTIES: THE WAR ON TERROR AND THE EROSION OF AMERICAN DEMOCRACY* 67–69 (2011).

⁸¹ *Id.*

⁸² Bernstein, *supra* note 20, at 474.

⁸³ See *id.*

⁸⁴ See HERMAN, *supra* note 80, at 68. A former director of the TSC testified to Congress that government agencies often base nominations on fragments of information and hearsay. *Id.* Little oversight or accountability is built into the system. *Id.* Instead, the system is left to strike its own balance between civil liberties and the need to prevent terrorism. *Id.* Unsurprisingly, this has led to significant watch-list accuracy issues. *Id.* For example, Nelson Mandela was finally removed from the terrorist watch list in July 2008 after Congress intervened. *Id.* at 69.

screening is achieving intended results, or if adjustments to agency programs or watch-listing guidance are needed.”⁸⁵ This tends to call into question the legitimacy of whatever criteria the government uses to identify potential terrorists. The ability to regularly quantify results is a necessary condition to effectively managing any system, including a system like the TSDB. Other similar reports have also found that widespread inaccuracy and incompleteness persists in terrorist watch lists.⁸⁶ The inaccuracy further calls into question the legitimacy of the watch-list criteria, and the incompleteness tends to indicate ineffective watch-listing procedures. Ultimately, these shortcomings diminish the efficacy of the watch lists.

B. THE COSTS

This inaccuracy is not without costs, both for the individuals on the lists and the government agencies and people in society that utilize the lists. The breakneck pace at which these lists are expanding magnifies the costs.⁸⁷ The inaccuracies in the lists (1) impact the effectiveness of the lists themselves and of the intelligence officers that utilize the lists to evaluate terrorist suspects; (2) distort society’s views of certain individuals; (3) impose high personal, monetary, and time costs on the listed individuals or classes of individuals; and (4) infringe on the listed individual’s privacy and personal liberties.

1. *Impact on Government and Society*

One commentator has suggested that government watch lists have at least three broad effects on the government, its agents,

⁸⁵ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-476, *supra* note 2, at 16. As of 2012, no entity was even collecting the data needed to conduct such assessments. *Id.* at 28. However, the TSC Director indicated that “conducting such assessments and developing related metrics will be important in the future.” *Id.* But this is apparently not a focus of the TSC or other agencies involved with terrorist watch lists. *Id.* Instead, the agencies focus on developing new screening and vetting programs. *Id.* It is hard to believe that such agencies will be able to develop effective programs in the future without adequate assessments of the current programs.

⁸⁶ See, e.g., OIG, FBI WATCHLIST PRACTICES, *supra* note 36, at 14–18.

⁸⁷ A 2007 FBI Inspector General report found that the list continues to expand by an average of 20,000 entries per month. OIG, TSC AUDIT, *supra* note 70, at iii. “Deficiencies in the accuracy of watch-list data increase the possibility that reliable information will not be available to frontline screening agents, which could prevent them from successfully identifying a known or suspected terrorist . . . [and] increase[] the chances of innocent persons being stopped or detained” *Id.*

and society. The lists (1) create overconfidence and diminish the skills of government agents and agencies; (2) obscure the complex reality from counterterrorism officials because of simplification; and (3) alter society's and government's view of individuals based on the categories the government has chosen.⁸⁸

First, government agents' overconfidence and skill deterioration occurs because removing the context surrounding the data an agent uses to evaluate a potential watch-listee makes the task look less like evaluating data and more like fact-finding.⁸⁹ Objective criteria may seem to support the terrorist database predictions, but in reality, they depend on an agent's assessment of the data.⁹⁰ The inability of that agent to recognize this distinction weakens that agent's decision-making skills over time, the results of which are confirmed by the watch list the agent helps to create.⁹¹ The dispersed nature of the watch-listing community also contributes to this problem by impeding the ability of an agent to assess the correctness of a database's predictions since the criteria of the predictive model are often unknown to the agents.⁹²

Second, the creators of lists tend to focus on a select few characteristics and ignore others.⁹³ While such simplification makes categorizing individuals practical, "it also inevitably ignores other attributes that may become important in their own right."⁹⁴ This in turn leads people to misinterpret the complex reality and potentially misdirect institutional resources.⁹⁵

Last, the commentator argues that "when governments and other powerful institutions create new social categories, 'people come to fit [those] categories' by reconceiving themselves in the categories' terms."⁹⁶ Government watch lists are such categories, and consequently, they may cause government and society to view members of society in accordance with that categorization.⁹⁷

⁸⁸ Bernstein, *supra* note 20, at 485–99.

⁸⁹ *Id.* at 489–90.

⁹⁰ See *supra* note 38; Bernstein, *supra* note 20, at 489–90.

⁹¹ Bernstein, *supra* note 20, at 490.

⁹² *Id.* at 489.

⁹³ *Id.* at 491.

⁹⁴ *Id.* at 491–92.

⁹⁵ *Id.* at 492–93.

⁹⁶ *Id.* at 494.

⁹⁷ *Id.* at 499.

2. *Impact on Individuals*

Individuals on watch lists also bear substantial costs themselves. The expansive growth of watch lists is likely to continue diminishing personal liberties.⁹⁸ Rahinah Ibrahim's story introduced in Part I epitomizes the liberty costs individuals bear for being on the No Fly List. In her case, the impact is life altering. While she was able to finish her doctoral degree without returning to the United States, her inclusion on the No Fly List has curtailed her academic and professional pursuits.⁹⁹ She has not been able to collaborate face-to-face with her colleagues in the United States, and she was unable to represent her country, Malaysia, in an international conference held in San Francisco.¹⁰⁰

Rahinah Ibrahim's experience is not unique. Others who have been placed on watch lists have seen their personal and professional lives impacted as a result. For instance, U.S. Marine Corps veteran Amayan Latif's inclusion on the No Fly List led to the reduction of his disability benefits because it prevented him from flying to the required evaluations and impeded his ability to pursue studies in Egypt.¹⁰¹ In the end, the inclusion of one's name on the No Fly or Selectee Lists has deleterious effects on that individual's privacy and personal autonomy.¹⁰² It subjects that individual to additional screening at airports, to restrictions on travel, and generally, to greater scrutiny by the federal government.¹⁰³

Lastly, the financial and time costs of vindicating oneself may be daunting while the result is often unclear. The average redress period is fifty-seven days,¹⁰⁴ which does not guarantee a

⁹⁸ The 9/11 Commission recognized the potential for the expanded government powers to diminish personal liberties. 9/11 COMM'N REPORT, *supra* note 22, at 393–95. It was in this realization that the commission made three recommendations regarding personal liberty. *Id.* First, the President should determine what may be shared among agencies and under what conditions, with privacy being a key factor in the decision-making process. *Id.* at 394. Second, the President should have the burden of proof for retaining the powers granted in the Patriot Act, which were to sunset in 2005. *Id.* at 394–95. Last, the criteria of an oversight board to monitor the impact on civil liberties and adherence to guidelines to protect them. *Id.* at 395.

⁹⁹ Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 988 (9th Cir. 2012).

¹⁰⁰ *Id.*

¹⁰¹ Latif v. Holder, 3:10-CV-00750-BR, 2013 WL 4592515, at *3 (D. Or. 2013).

¹⁰² *See id.* at *3–6.

¹⁰³ *See id.*

¹⁰⁴ OIG, EFFECTIVENESS OF TRIP, *supra* note 17, at 67.

favorable result but instead just a vague answer.¹⁰⁵ In Rahinah Ibrahim's case, she incurred the costs of two appeals before getting to a trial on the merits.¹⁰⁶ While not all individuals on a Watch List will have to expend the same level of effort, they may still incur substantial costs, such as hiring counsel at their own expense, taking time away from work, or being forced to stop working until the matter is cleared up due to a revoked security clearance.¹⁰⁷ For Rahinah Ibrahim, the saga has been dragged out over nine years so far.¹⁰⁸

The government imposes these burdens without an adequate redress method.¹⁰⁹ Instead, it tends to focus more on getting individuals on the list than getting innocent individuals off the list.¹¹⁰ Aliens bear the brunt of the burden.¹¹¹ Unlike an American resident or citizen, aliens may be able to avoid flying to or from the United States, and thus avoid the impact of the list, but that limitation on traveling may hamper their professional and personal lives.¹¹² As a civilized society, we owe such individuals the opportunity to remove the cloud on their name. The government continues to refine its redress procedures. The most recent iteration is TRIP, which still leaves much to be desired.¹¹³

¹⁰⁵ *Id.* at 90 (noting that the letters sent by the TSC to redress-seekers do not disclose whether the individual was on the list or whether the individual is still on the list).

¹⁰⁶ *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 991—92 (9th Cir. 2012); The Associated Press, *supra* note 14.

¹⁰⁷ 49 C.F.R. § 1560.203 (2013) (the redress procedures permit an individual to be represented by counsel); HERMAN, *supra* note 80, at 69–70 (highlighting the story of a helicopter pilot that was suspended with pay and nearly fired for his inclusion on the No Fly List).

¹⁰⁸ *Ibrahim*, 669 F.3d at 987 (Ibrahim was denied boarding due to being on the No Fly List on January 2, 2005); Dan Levine, *UPDATE 2-U.S. Judge Rules Against Government in No-Fly Challenge*, REUTERS (Jan. 14, 2014), <http://www.reuters.com/article/2014/01/14/usa-noflylist-ruling-idUSL2N0KO24120140114> (noting that a federal judge recently ruled in favor of Rahinah Ibrahim by ordering the government to disclose her No Fly List status and correct any mistaken information).

¹⁰⁹ *Factsheet: The ACLU's Challenge to the U.S. Government's "No Fly List"*, *supra* note 71.

¹¹⁰ HERMAN, *supra* note 80, at 69.

¹¹¹ See *Factsheet: The ACLU's Challenge to the U.S. Government's "No Fly List"*, *supra* note 71.

¹¹² See *Ibrahim*, 669 F.3d at 988.

¹¹³ OIG, *EFFECTIVENESS OF TRIP*, *supra* note 17, at 3.

C. PROBLEMS WITH TRIP

The TRIP program is undoubtedly an improvement over the previous redress programs.¹¹⁴ The government invested significant resources into developing a program that offers the ability to handle redress issues across many disparate agencies.¹¹⁵ This program, however, comes up short in several areas. Numerous government reports have highlighted the efficacy issues inherent in the current redress process.¹¹⁶ Moreover, the government generally hides the redress process from the public.¹¹⁷ Combined, the efficacy and transparency issues diminish the legitimacy of the TRIP program.

1. *Efficacy*

The usefulness of any government redress process rests in part on the ability to rely on it to reach the proper conclusion. However, the lack of adequate procedures casts doubt on the appropriateness of such reliance.

The TRIP program consists of ten federal agencies and offices that participate in the redress process.¹¹⁸ These agencies have made commitments to staff or fund the TRIP program,¹¹⁹ but no clear authority structure exists and standard operating procedures are incomplete.¹²⁰ Such structure is necessary in order to promote effective participation by the many agencies.¹²¹ The

¹¹⁴ See *supra* Part II.C.

¹¹⁵ OIG, EFFECTIVENESS OF TRIP, *supra* note 17, at 66.

¹¹⁶ See, e.g., *id.* at 19; OIG, FBI WATCHLIST PRACTICES, *supra* note 36 (The report notes the issues with the nomination, modification, and removal of watch listed individuals. It also notes the failure to remove watch listed individuals in a timely manner, and the failure of agents to request removal of individuals even after they determine that an individual should no longer be on the watch list.); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-476, *supra* note 2, at 2 (noting agencies do not routinely assess the impacts of watch listing policies).

¹¹⁷ See DHS TRIP Application Process FAQ, DEPARTMENT HOMELAND SECURITY, <http://trip.dhs.gov/FAQ.aspx> (last visited Nov. 7, 2014 at 2:49 PM).

¹¹⁸ OIG, EFFECTIVENESS OF TRIP, *supra* note 17, at 29.

¹¹⁹ Terrorist Screening Ctr., *Watchlist Redress Memorandum of Understanding*, FBI (Oct. 24, 2007), <http://www.fbi.gov/about-us/nsb/tsc/tsc-watchlist-redress-m.o.u> (explaining that the ten agencies listed have agreed to certain information sharing, to correcting erroneous information when it is found, and to provide appropriate staff and resources to the redress process).

¹²⁰ OIG, EFFECTIVENESS OF TRIP, *supra* note 17, at 29.

¹²¹ Because "TRIP is a multiagency program with participants in a number of locations, the repeatability of program operations depends on well-documented procedures, clear guidance, and effective monitoring. Despite these operational requirements, TRIP has been slow to develop detailed guidance, sound proce-

lack of structure often leads to “unreliable and fluctuating support from [the] participating agencies” and offices.¹²² The varying support consequently creates backlogs, delays, and inconsistent handling of cases, which in turn negatively affect the individuals seeking redress and diminishes the quality of the lists.¹²³

Additionally, independent or impartial adjudicators do not take part in the TRIP redress decision-making process.¹²⁴ Rather, the TRIP program triages and forwards redress requests to the nominating agency to review and make a determination.¹²⁵ Conversely, an independent and impartial adjudicator could increase the process’s fairness and add perspective to the agencies’ conclusions.¹²⁶ These procedural deficiencies ultimately diminish the efficacy with which TRIP operates.

2. Transparency

The TRIP process is cloaked in a veil of secrecy.¹²⁷ The current system provides redress-seekers with confirmation of receipt of their redress request and with confirmation when it is closed.¹²⁸ But the government designs the correspondence to obfuscate whether the redress-seeker was on the watch list or is the target of an investigation.¹²⁹ In fact, TRIP provides no information regarding the current or former watch-list status to the redress-seekers, nor does it provide an overview of the redress activities the government performed.¹³⁰

dures, or effective quality assurance measures to support consistent case handling.” *Id.* at 81.

¹²² *Id.* at 31. For instance, “the program operated for several months without” one of the participating agency represented by a detailed agent. *Id.* The TRIP program manager is often seen as a peer to the participating agencies. *Id.* As such, the “agencies do not always respond promptly to the TRIP program manager’s requests for action, [and] on occasion,” reject the requests. *Id.*

¹²³ *Id.* at 80, 88, 107.

¹²⁴ *Id.* at 34.

¹²⁵ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-476, *supra* note 2.

¹²⁶ See OIG, EFFECTIVENESS OF TRIP, *supra* note 17, at 89.

¹²⁷ *Id.*

¹²⁸ DHS TRIP Application Process FAQ, *supra* note 117. When an individual submits a redress application, the individual receives a “redress control number.” *Id.* The redress control number allows the individual to track the status online. *Id.* The status will be one of four notations: in progress, closed, pending paperwork, or no paperwork. *Id.*

¹²⁹ OIG, EFFECTIVENESS OF TRIP, *supra* note 17, at 89.

¹³⁰ *Id.*

Certain agencies within the government strenuously argue that the secrecy is necessary to protect national security.¹³¹ However, at least in the No Fly and Selectee List context, such secrecy is arguably pointless.¹³² An observant traveler can likely deduce whether they are on either the No Fly or Selectee List based on the treatment they receive from the airline and TSA screening personnel.¹³³ For example, an individual on the Selectee List will not be able “to print a boarding pass online or at an airport kiosk” and will receive enhanced security screening when passing through security checkpoints.¹³⁴ Yet, the DHS still operates the TRIP redress process with a high level of secrecy, even for airline-travel-related complaints.¹³⁵ This secrecy leaves the redress-seekers unsure about the resolution of their traveling troubles.¹³⁶

3. *Legitimacy*

The legitimacy of the process suffers from the efficacy deficiencies and lack of transparency. The process not only lacks legitimacy to the individuals seeking redress but also to the American public. In order for the individual seeking redress to find the process legitimate, he or she needs to understand the process and believe that the process will produce a just result.¹³⁷ However, TRIP’s obscure and inconsistent procedures make this all but impossible.¹³⁸ Moreover, the efficacy shortcomings are apparent to the public through news stories of Nelson Mandela’s inclusion on the No Fly List until Congress intervened in 2008 and of the late-Senator Kennedy’s inclusion on the list.¹³⁹

D. CHANGE NEEDED

The discussion above leads to the indelible conclusion that we need a change. However, we must never forget that “Al Qaeda is

¹³¹ Letter from Arthur M. Cummins, II to Carlton I. Mann, *supra* note 41, at 125.

¹³² OIG, EFFECTIVENESS OF TRIP, *supra* note 17, at 91–92.

¹³³ *Id.*

¹³⁴ *Id.* at 92.

¹³⁵ DHS TRIP Application Process FAQ, *supra* note 117.

¹³⁶ OIG, EFFECTIVENESS OF TRIP, *supra* note 17, at 89–90.

¹³⁷ “Clear and transparent communication can help petitioners understand how their case has been handled, and provide assurance that it has been addressed appropriately.” *Id.* at 89.

¹³⁸ See *supra* text accompanying notes 120–35.

¹³⁹ See HERMAN, *supra* note 80, at 68–70.

dependent upon travel, and each time an operative boards a plane or crosses an international border, we have an opportunity to detect and capture him.”¹⁴⁰ Watch lists offer an important vehicle for detecting and preventing future terrorist acts.¹⁴¹ But proper management and proper redress procedures are critical. While one method may be depending on the law of large numbers to ensure we capture all potential terrorists, a more tailored method with a focus on efficacy and fairness seems more in line with our societal values. The current process is a role reversal for our legal system. Instead of people being innocent until proven guilty, their freedom is restricted until they are proven innocent.¹⁴² The choice should not be between liberty and security.¹⁴³

IV. POTENTIAL SOLUTIONS

Developing a solution to the issues inherent in the use of No Fly and Selectee Lists is no easy task. On the one hand, the fairness and privacy concerns weigh heavy. The method for adding an individual to either the No Fly or Selectee List lacks fairness.¹⁴⁴ The government places individuals on the watch lists based on fragments of information and hearsay with little to no opportunity for that individual to confront the evidence against them.¹⁴⁵ Moreover, the lists significantly limit an individual’s personal autonomy by restricting travel and intrude on an individual’s privacy.¹⁴⁶ But on the other hand, the risks posed from missing a chance to thwart a would-be terrorist attack are colossal. In the context of the No Fly and Selectee Lists, overregulating the system could contribute to another 9/11-type event.¹⁴⁷

¹⁴⁰ Stewart A. Baker & Nathan Alexander Sales, *Homeland Security, Information Policy, and the Transatlantic Alliance*, in *LEGAL ISSUES IN THE STRUGGLE AGAINST TERROR* 277, 280 (John Norton Moore & Robert F. Turner eds., 2010).

¹⁴¹ More effective use of watch lists could have identified as many as three of the 9/11 hijackers. See 9/11 COMM’N REPORT, *supra* note 22, at 384. However, no one in the U.S. government was analyzing terrorists’ travel patterns. *Id.*

¹⁴² HERMAN, *supra* note 80, at 69.

¹⁴³ “The choice between security and liberty is a false choice, as nothing is more likely to endanger America’s liberties than the success of a terrorist attack at home. Our history has shown us that insecurity threatens liberty. Yet, if our liberties are curtailed, we lose the values that we are struggling to defend.” 9/11 COMM’N REPORT, *supra* note 22, at 395.

¹⁴⁴ See *supra* Part III.A.

¹⁴⁵ See HERMAN, *supra* note 80, at 68–69.

¹⁴⁶ See *id.*

¹⁴⁷ “The cost of false positives must be balanced against that of false negatives. The failure to detect the 9/11 plot was an exceptionally costly false negative.”

However, the current system seems to have reached an equilibrium too heavily favoring national security with little regard to personal liberties.¹⁴⁸ The courts and commentators that have addressed the issue of watch lists generally have suggested a variety of models.¹⁴⁹ This article groups these suggestions into three categories: (1) extending due process protections; (2) increasing front-end efficacy; and (3) extending the Privacy Act of 1974. This section will discuss the benefits and drawbacks of each of those categories.

A. EXTENDING DUE PROCESS PROTECTIONS

The extension of due process rights to aliens outside the borders of the United States that are listed on the No Fly or Selectee Lists provides an attractive method for the courts to assert their prerogative to review the government's watch-listing decision. In *Rahinah Ibrahim's* case, the Ninth Circuit did just that.¹⁵⁰

In *Ibrahim v. Department of Homeland Security*, the Ninth Circuit crafted a new rule for the extension of the Fifth Amendment's due process protections to those aliens outside the territory of the United States that have developed "significant voluntary connections" with the United States.¹⁵¹ In that case, the Ninth Circuit read two Supreme Court cases together, *Boumediene v. Bush* and *United States v. Verdugo-Urquidez*, to find that it should apply a functional approach to the application of constitutional rights to aliens outside our borders.¹⁵² In reading these two cases together, the Ninth Circuit constructed a rule that extends due process rights to nonresident aliens who have developed a significant voluntary connection with the United States.¹⁵³ Applying it to *Rahinah Ibrahim's* situation, the court found that the following facts established her significant voluntary connections with the United States: (1) she studied in the United States for four years on a student visa; (2) she voluntarily departed; (3)

Richard A. Posner, *Privacy, Surveillance, and Law*, 75 U. CHI. L. REV. 245, 252 (2008).

¹⁴⁸ See HERMAN, *supra* note 80, at 68–69.

¹⁴⁹ See sources cited *supra* note 15.

¹⁵⁰ *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 997 (9th Cir. 2012).

¹⁵¹ *Id.* The court in fact extended both the First and Fifth Amendments for certain aliens. *Id.* This article only addresses the viability of the Fifth Amendment Due Process Clause claim.

¹⁵² *Id.*

¹⁵³ See *id.*

she intended to return after a brief stay abroad; and (4) the trip's purpose was to further her connections with the United States in that Stanford sponsored the trip.¹⁵⁴

In Ibrahim's case, the extraterritorial extension of the Fifth Amendment provides her with a method to challenge her inclusion on the No Fly List when she would have otherwise had none. She had pursued the then-available redress program but had not been successful.¹⁵⁵ Without the court stepping in, her struggle to remove her name from the No Fly List would have ended unsuccessfully.¹⁵⁶ While this is an appealing avenue for courts in that it provides the courts with an unassailable method to review the government's No Fly and Selectee Lists decisions, the legal footing upon which the logic stands is questionable, and it is unclear what type of system the Due Process Clause might require.

1. *Shaky Legal Footing*

The Ninth Circuit employed a novel approach to the extraterritoriality of the Fifth Amendment in *Ibrahim*; however, this novel approach required misreading both *Boumediene* and *Verdugo*.¹⁵⁷ It also ignored Supreme Court precedent and history regarding the role of courts in foreign affairs. The executive traditionally has been the "sole organ" of the nation on foreign affairs.¹⁵⁸ The scope of the foreign affairs power includes the

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 987–88.

¹⁵⁶ *See id.* at 991.

¹⁵⁷ Compare *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (addressing the issue of whether the Suspension Clause applies to enemy combatants detained at Guantanamo Bay. Rejecting the government's territorial approach, the Court announced a functional test that looked at three factors to determine the extraterritorial reach of the Suspension Clause) with *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261, 272 (1990) (dealing with the extraterritorial scope of the Fourth Amendment's prohibition against illegal search and seizures. In holding that the Fourth Amendment's protections did not apply, the Court stated that aliens receive constitutional protections when they (1) enter the United States, and (2) develop significant voluntary connections with the United States).

¹⁵⁸ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936). Some argue that *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), shifted control of the foreign affairs power to give the bulk of it to Congress. See Robert F. Turner, *U.S. Constitutional Issues in the Struggle Against Terrorism*, in *LEGAL ISSUES IN THE STRUGGLE AGAINST TERROR* 81, 97–98 (John Norton Moore & Robert F. Turner eds., 2010). However, there is a stronger argument that *Curtiss-Wright* controls when the Court is addressing the executive's foreign affairs power. *Id.* at 98–102.

ability to make policies regarding aliens.¹⁵⁹ Historically, constitutional protections extended to aliens only while they were within the United States in order to promote trade, to grow the population, and to prevent international conflicts.¹⁶⁰ Thus, the footing upon which the *Ibrahim* court's decision stands seems unstable in light of precedent and history.

Additionally, the *Ibrahim* court's rule only provides constitutional protections to some subsets of aliens that have developed "significant voluntary connections" with the United States.¹⁶¹ Although the contours of this test are undefined, it clearly does not cover all individuals that the No Fly and Selectee Lists impact.¹⁶² Instead, it leaves the potential to challenge one's inclusion on such lists at the whims of a court.

2. Does the Current System Meet the Due Process Requirements?

Assuming the *Ibrahim* court is correct in extending due process protections to aliens such as Rahinah Ibrahim, the question then is whether the current system meets the Due Process Clause's strictures. Three factors are relevant to this determination under the *Mathews v. Eldridge* balancing test: "(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."¹⁶³

The first step in the analysis is to identify the private interest affected. The No Fly and Selectee Lists restrict ones ability to enter an airport's sanitized area as well as the ability to board a plane.¹⁶⁴ Such restrictions potentially infringe upon three protected interests: limiting the right to travel, restricting employ-

¹⁵⁹ *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1950) ("It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.").

¹⁶⁰ J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 507–08 (2007).

¹⁶¹ *Ibrahim*, 669 F.3d at 997.

¹⁶² See *id.*

¹⁶³ *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

¹⁶⁴ OIG, EFFECTIVENESS OF TRIP, *supra* note 17, at 91–92.

ment, or imposing a stigma.¹⁶⁵ Inclusion on the No Fly List precludes one's ability to travel on a commercial airline, which essentially makes international and certain domestic travel impossible, or at least highly impractical.¹⁶⁶ Similarly, being listed on the No Fly List may preclude one from working on airlines that fly to or within the United States.¹⁶⁷ Likewise, one's inclusion on the No Fly and Selectee List may impose an impermissible stigma under the *Paul v. Davis* stigma-plus framework.¹⁶⁸ For example, Rahinah Ibrahim's inability to fly to the United States because of her inclusion on the No Fly List may meet the stigma-plus requirements in that the listing has tarnished her name and precluded her from attending professional conferences and other meetings that have affected her career.¹⁶⁹ Individuals on the Selectee List may also meet the stigma-plus requirements. Inclusion on that list arguably imposes a stigma on that individual as well as additional burdens, such as the inability to check-in online or at airport kiosks and the additional time required during the process of checking in.¹⁷⁰

After identifying a protected interest, the next step in the analysis is to determine whether the current system is sufficiently tailored to meet the requirements of due process. This requires applying the three-factor *Mathews* balancing test to the current system. The No Fly and Selectee Lists should be evaluated separately under this test since their level of deprivation is different.¹⁷¹

The No Fly List would likely fail this test. The private interests, and the deprivation thereof, are significant, and the risk of erroneous deprivation is high with the current procedures.¹⁷² However, the government's interest is also substantial—that is,

¹⁶⁵ Justin Florence, *Making the No Fly List Fly: A Due Process Model for Terrorist Watchlists*, 115 YALE L.J. 2148, 2159–65 (2006).

¹⁶⁶ See OIG, EFFECTIVENESS OF TRIP, *supra* note 17, at 7, 36. Restrictions on an individual's ability to fly on a case-by-case basis may violate the right of travel. Florence, *supra* note 165, at 2160–62.

¹⁶⁷ See HERMAN, *supra* note 80, at 69–70. Certain air travel employees', like pilots', loss of employment due to inclusion on a watch list may preclude the individual from pursuing a chosen occupation and require due process. Florence, *supra* note 165, at 2162–63.

¹⁶⁸ Florence, *supra* note 165, at 2164–65 (Stigma-plus generally requires a government action that tarnishes a person's reputation accompanied by some other government action).

¹⁶⁹ Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 988 (9th Cir. 2012).

¹⁷⁰ Shane, *supra* note 15, at 853 n.117.

¹⁷¹ See *supra* Part II.B.

¹⁷² See *supra* Part II.B.

stopping a terrorist attack. The cost of additional procedures and the administrative burden is also likely quite high since thousands of individuals are on the list.¹⁷³ Providing all of these individuals with additional procedural safeguards would create a significant administrative burden on a system that is already struggling to keep up.¹⁷⁴ Weighing these factors, the private interest and risk of erroneous deprivation seem high enough to require some type of additional procedures.¹⁷⁵

The Selectee List analysis, however, likely comes out in the government's favor.¹⁷⁶ Because the interests affected are less weighty,¹⁷⁷ the government's procedures for the Selectee List are likely constitutionally sufficient.¹⁷⁸ The Selectee List does not preclude flying to or within the United States; instead, it subjects listed individuals to enhanced screening during their journey.¹⁷⁹ It may also affect a limited number of foreign pilots and airline workers who regularly travel to the United States who are on that list.¹⁸⁰ The risk of erroneous deprivation and cost of additional procedures are likely the same as the No Fly List.¹⁸¹ However, when weighing these factors in context of the Selectee List, the significant government interest outweighs the private interest, risk of erroneous deprivation, and the need for additional procedures.¹⁸²

The due process model attempts to fix the systematic problems with a blunt instrument rather than the needed scalpel. Functionally, this approach will lead to much uncertainty for the traveling public and the government employees tasked with administering this program. In an area so crucial to our national security, injecting constitutional rights for a broader set of aliens abroad seems inappropriate. Additionally, it will likely require vindicating one's rights in court rather than through less costly, less burdensome administrative procedures. While

¹⁷³ See *Factsheet: The ACLU's Challenge to the U.S. Government's "No Fly List"*, *supra* note 71.

¹⁷⁴ See *supra* Part III.A.

¹⁷⁵ See *id.*

¹⁷⁶ But see Shane, *supra* note 15, at 843 n.117 (noting that some argue that inclusion on the Selectee List may also unconstitutionally deprive an individual of a protected right).

¹⁷⁷ See *supra* Part II.B.

¹⁷⁸ See *id.*

¹⁷⁹ OIG, EFFECTIVENESS OF TRIP, *supra* note 17, at 91-92.

¹⁸⁰ See Florence, *supra* note 165, at 2162-63.

¹⁸¹ See *supra* text accompanying notes 173-74.

¹⁸² See Posner, *supra* note 147, at 252-53.

the due process requirements may be a useful conceptual starting point,¹⁸³ the courts providing such rights is wholly inappropriate.

B. INCREASING FRONT-END EFFICACY

Inaccuracy and incompleteness plague the watch lists.¹⁸⁴ Designing a system to improve the front-end procedures could significantly reduce the burden the watch lists place on innocent individuals.¹⁸⁵ The watch-list nomination process and the TRIP system suffer from, among other things, incomplete standard operating procedures, lack of an authority structure, and inconsistent support from participating agencies.¹⁸⁶ These issues lead to inconsistent handling of cases and confusion among the agencies about the proper procedures to follow when evaluating nominations and redress requests.¹⁸⁷ The government bureaucracy does not timely address these issues because no agency is routinely assessing government-wide problems or evaluating the costs and the benefits of the current watch-list procedures.¹⁸⁸ Ultimately, the front-end issues diminish the reliability and usefulness of the lists and unnecessarily impact individuals erroneously placed on the watch lists.¹⁸⁹

Modifying the front-end nomination process to address these deficiencies may improve the quality of the lists. In order to increase front-end efficacy, the government would have to (1) institute and disseminate written protocols to all participating agencies; (2) refine the decision-making process so that it produces reliable and consistent results; (3) develop adequate quality control procedures, including methods for assessing accuracy and addressing weaknesses; and (4) develop technology systems to facilitate this structure.¹⁹⁰ The current system is either par-

¹⁸³ See Shane, *supra* note 15, at 841–45.

¹⁸⁴ HERMAN, *supra* note 80, at 68–69.

¹⁸⁵ See *id.*

¹⁸⁶ See *supra* Part III.

¹⁸⁷ OIG, EFFECTIVENESS OF TRIP, *supra* note 17, at 29–32 (noting the lack of clear operational authorities and responsibilities and the impact that this can have on the watch lists).

¹⁸⁸ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-476, *supra* note 2, at 12.

¹⁸⁹ See OIG, FBI WATCHLIST PRACTICES, *supra* note 36, at 36–45 (noting that the incomplete policies and failure to adhere to existing policies result in watch list errors due to failures to correctly nominate, modify, or remove individuals from the watch lists).

¹⁹⁰ Shane, *supra* note 15, at 836–37. The author advocates such a system that he calls “Bureaucratic Justice.” *Id.* at 810. His system would inject fairness into the

tially or completely lacking in all of these areas.¹⁹¹ Numerous Inspector General and GAO reports have noted the need for the agencies managing the watch lists to improve on some or all of these areas.¹⁹² Such improvements are desirable and achievable.¹⁹³ The changes would benefit the government in that they would increase the accuracy of the watch lists and, consequently, the chances of preventing a terrorist attack.¹⁹⁴ Likewise, the changes would benefit individuals by limiting the number of individuals erroneously included on the lists.¹⁹⁵

However, it is unlikely that increasing front-end fairness by itself will sufficiently guard against the fairness and efficacy issues. A basic refrain echoes from national security hawks and agencies supporting the watch lists: "The intelligence services have no alternative to casting a wide net with a fine mesh if they are to have reasonable prospects of obtaining the clues that will enable future terrorists attacks on the United States to be prevented."¹⁹⁶ Stated differently: If agencies are left to strike their own balance between national security and civil liberties, the agencies will strike the balance heavily in favor of national security.¹⁹⁷ Moreover, the ability of such a front-end system to work depends on human actors.¹⁹⁸ Even if agency employees follow front-end procedures, human error is inevitable.¹⁹⁹ While proper quality control systems may catch many of these mistakes, undoubtedly some will be missed. Thus, a properly tailored redress system is essential.

front-end procedures. *Id.* at 821. This requires five characteristics: (1) clear written standards; (2) robust nominating procedures; (3) regular auditing; (4) adequate information technology systems to facilitate interagency sharing; and (5) special procedures for the handling of uncorroborated tips and pattern matching. *Id.* at 836–37. The author would then base the redress system on the extent to which the agency implemented the front-end fairness procedures. *Id.* at 851–53.

¹⁹¹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-476, *supra* note 2, at 12–13.

¹⁹² See, e.g., *id.*; OIG, EFFECTIVENESS OF TRIP, *supra* note 17, at 29–32.

¹⁹³ See OIG, EFFECTIVENESS OF TRIP, *supra* note 17, at 29–32.

¹⁹⁴ See *id.*

¹⁹⁵ See *id.*

¹⁹⁶ Posner, *supra* note 147, at 252–53.

¹⁹⁷ See HERMAN, *supra* note 80, at 68.

¹⁹⁸ Cf. OIG, FBI WATCHLIST PRACTICES, *supra* note 36, at 29–30 (explaining that FBI agents failed to follow procedures in place due to lack of experience, training, awareness, or appreciation of an agent's role in the process and that the failure to follow the procedures impacted the watch list accuracy).

¹⁹⁹ See *id.*

C. THE PRIVACY ACT OF 1974

Extending the Privacy Act of 1974 is yet another option for addressing the efficacy and fairness concerns inherent in the watch-listing process.²⁰⁰ Congress enacted the Privacy Act in response to the growing amount of data in the government's possession and the concerns about the power that the government could wield by using such data.²⁰¹ The Privacy Act regulates agencies' collection, use, and disclosure of information on individuals.²⁰² In particular, the Privacy Act imposes limits on the information agencies may maintain on individuals to that which is required for an agency's mission.²⁰³ And it requires agencies to maintain records "with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual" in making determinations about that individual.²⁰⁴ In order to enforce these provisions, the Privacy Act provides that individuals may see and request corrections to the files agencies have on them.²⁰⁵ However, agencies in certain situations may exempt entire systems of records from the Act so long as they publish a rule notifying the public of exemption.²⁰⁶ The exemptions generally pertain to law enforcement and national security activities and government personnel related records.²⁰⁷

The intent of the Privacy Act was to provide citizens with a strong enforcement power and place strict limits on agencies.²⁰⁸ It seeks to accomplish this goal by placing the vindication right in the hands of the person most vested in the correctness of the files: the individual.²⁰⁹

²⁰⁰ See 5 U.S.C. § 552a (2012).

²⁰¹ Brumbach, *supra* note 15, at 1029–31.

²⁰² 33 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, JUDICIAL REVIEW § 8446 (1st ed. 1969 & Supp. 2013).

²⁰³ 5 U.S.C. § 552a(e)(1).

²⁰⁴ *Id.* § 552a(e)(5).

²⁰⁵ *Henke v. U.S. Dep't of Commerce*, 83 F.3d 1453, 1456–57 (D.C. Cir. 1996) ("The Privacy Act—unlike the Freedom of Information Act—does not have disclosure as its primary goal. Rather, the main purpose of the Privacy Act's disclosure requirement is to allow individuals on whom information is being compiled and retrieved the opportunity to review the information and request that the agency correct any inaccuracies.").

²⁰⁶ 5 U.S.C. § 552a(j)–(k).

²⁰⁷ *Id.*

²⁰⁸ Brumbach, *supra* note 15, at 1048.

²⁰⁹ *Id.*

However, there are some pitfalls. First, the exemptions in the Privacy Act permit agencies to exempt most, if not all, of the terrorists related databases, including the No Fly and Selectee Lists.²¹⁰ Opening the agencies to the Privacy Act's strictures may expose sensitive information contained within the agencies that is not yet being used to infringe upon the individual's personal liberties.²¹¹ For instance, the agency may obtain information during an investigation that does not lead them to nominate the individual to a terrorist watch list.²¹² In the national security context, it should only be upon an actual deprivation, such as the listing on the No Fly List and consequent inability to board a commercial airline, that the agency must validate its decision.²¹³ Second, the Privacy Act only applies to citizens and resident aliens.²¹⁴ Considering the vast majority of individuals on the No Fly and Selectee Lists are nonresident aliens,²¹⁵ expanding the applicability of the Privacy Act to capture the air-security watch lists will not benefit most of the affected individuals.²¹⁶ Lastly, the Privacy Act only permits fixing incorrect facts, not incorrect conclusions.²¹⁷ Many times the decision to list an individual on a watch list depends on inferences drawn from the facts.²¹⁸ While correcting erroneous underlying facts may cause an agency to change its conclusion, it does not necessarily require such an action. Thus, seeking redress through the Privacy Act may leave the redress-seeker in the same position.

V. ANOTHER FRAMEWORK

The previously discussed solutions either incorrectly or incompletely address the problems individuals listed on either the No Fly List or Selectee List face. Undoubtedly, improvements to

²¹⁰ STEVE C. POSNER, *PRIVACY LAW AND THE USA PATRIOT ACT* § 9.28 (Supp. 2009). Agencies tasked with managing the terrorist watch lists generally do not welcome individual corrections. *Id.*

²¹¹ "[I]t is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light." *Id.* (quoting 28 C.F.R. § 16.96).

²¹² *See id.*

²¹³ *See id.*

²¹⁴ 5 U.S.C. § 552a(a)(2) (2012).

²¹⁵ *Factsheet: The ACLU's Challenge to the U.S. Government's "No Fly List"*, *supra* note 71.

²¹⁶ *See id.*

²¹⁷ *See* 5 U.S.C. § 552a(k)(5).

²¹⁸ *See* HERMAN, *supra* note 80, at 68.

the front-end watch-listing procedures are necessary.²¹⁹ Such improvements should include establishing clear authority structures; instituting and disseminating best practices policies to all employees involved in the watch-listing process; clearly defining requirements for the listing of an individual on a watch list; implementing routine and independent quality control procedures; and developing and monitoring metrics to measure the costs and benefits of the watch-listing procedures in place.²²⁰

However, front-end improvements are only a part of the solution. The Selectee and No Fly Lists place heavy burdens on the traveling public listed on either of those lists.²²¹ Such burdens should have correspondingly equal opportunities for redress. Without an appropriate backend redress system, the institutional bias in favor of watch-listing an individual will result in undue burdens.²²²

In other contexts involving terrorism, the government uses systems that provide a greater level of transparency and judicial review but still protect against the dissemination of classified information. The process the Secretary of State uses to designate a Foreign Terrorist Organization (FTO) is one such system.²²³ Implementing a similar system in the aviation watch-list context will curtail many of the deficiencies in that system.

A. THE STATUTORY STRUCTURE

The Secretary of State designates groups as FTOs that engage or intend to engage in terrorist activities.²²⁴ In order to designate an organization as a FTO, the Secretary must make three statutorily required findings: (1) that the organization is foreign; (2) that the organization engages or intends to engage in terrorism; and (3) that the activities threaten the national security of the United States.²²⁵ In making these findings, the Secre-

²¹⁹ See generally OIG, EFFECTIVENESS OF TRIP, *supra* note 17, at 79–108; OIG, FBI WATCHLIST PRACTICES, *supra* note 36, at iv–xxv.

²²⁰ See OIG, EFFECTIVENESS OF TRIP, *supra* note 17, at 1–2.

²²¹ See *supra* Part II.B.

²²² See HERMAN, *supra* note 80, at 68.

²²³ See Designation of Foreign Terrorist Organizations, 8 U.S.C. § 1189 (2012).

²²⁴ Bureau of Counterterrorism, *Foreign Terrorist Organization*, U.S. DEPARTMENT OF STATE (Sept. 28, 2012), <http://www.state.gov/j/ct/rls/other/des/123085.htm>.

²²⁵ 8 U.S.C. § 1189(a)(1).

The Secretary is authorized to designate an organization as a foreign terrorist organization in accordance with this subsection if the Secretary finds that:

(A) the organization is a foreign organization;

tary may rely on both classified and non-classified information but must compile an administrative record in support of the designation.²²⁶ The statute further requires that the Secretary notify certain congressional leaders seven days prior to designating an organization and then publish the designation in the Federal Register seven days after notifying the congressional leaders.²²⁷ The designation lasts until it is revoked or is set aside by the courts.²²⁸

Nevertheless, FTOs may request the Secretary to review the designation after two years.²²⁹ In the request, the FTO must present relevant evidence that the circumstances supporting the designation "are sufficiently different from the circumstances that were the basis for the designation such that a revocation with respect to the organization is warranted."²³⁰ The Secretary must then publish a decision within 180 days in the Federal Register.²³¹

Additionally, FTOs may seek judicial review in the U.S. Court of Appeals for the District of Columbia within thirty days of publication in the Federal Register of a designation, amendment, or other determination.²³² The court reviews the designation solely based on the administrative record, but the Secretary may provide the court with classified information to review *ex parte* and *in camera*.²³³ In assessing the Secretary's decision, the court applies standards similar to those found in the Administrative Procedures Act—that is, the court asks whether the decision was arbitrary and capricious, contrary to constitutional right, in excess of statutory authority, lacking substantial support in the re-

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- (B) the organization engages in terrorist activity (as defined in section 1182(a)(3)(B) of this title or terrorism (as defined in section 2656f(d)(2) of title 22), or retains the capability and intent to engage in terrorist activity or terrorism); and
 - (C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.

Id.

²²⁶ *Id.* § 1189(a)(3).

²²⁷ *Id.* § 1189(a)(2)(A).

²²⁸ *Id.* § 1189(a)(4)(A).

²²⁹ *Id.* § 1189(a)(4). The prior version of the statute required the Secretary to renew the designation every two years or else it would expire. Bureau of Counterterrorism, *supra* note 224.

²³⁰ 8 U.S.C. § 1189(a)(4)(B)(iii).

²³¹ *Id.* § 1189(a)(4)(B)(iv)(III).

²³² *Id.* § 1189(c)(1).

²³³ *Id.* § 1189(c)(2).

cord, or otherwise not in accord with the law.²³⁴ However, the court has found the third finding, that is, that the organization's activity threatens the national security of the United States, is nonjusticiable.²³⁵

B. EQUITIES OF THE SYSTEM

Commentators have criticized the system for due process issues and the lack of an impartial adjudicator in making the initial designation decision.²³⁶ But when compared to the current system for listing individuals on the No Fly and Selectee Lists, it offers a practical alternative with significant improvements.

First, the FTO statute requires the Secretary of State to make certain findings before designating an organization as an FTO.²³⁷ Unlike the No Fly and Selectee Lists, this criteria is public.²³⁸ Second, the requirement to compile an administrative record that is the sole support for the designation provides a basis upon which the courts can review the agency's decision.²³⁹ Application of this requirement to the aviation-security watch-list context would also improve the effectiveness of any other independent review, such as internal quality control mechanisms implemented as part of improvements in front-end efficacy.²⁴⁰ Third, while the record is not a result of a "run-of-the-mill administrative proceeding . . . ,"²⁴¹ and the Secretary is not required to divulge classified information to the FTO,²⁴² the level of disclosure and administrative process far exceeds the aviation-

²³⁴ *People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999); compare 5 U.S.C. § 706 (2012) (scope of review under the Administrative Procedures Act) with 8 U.S.C. § 1189(c)(3) (scope of review under the Designation of Foreign Terrorist Organizations statute).

²³⁵ *People's Mojahedin Org. of Iran*, 182 F.3d at 23.

²³⁶ Micah Wyatt, *Designating Terrorist Organizations: Due Process Overdue*, 39 GOLDEN GATE U.L. REV. 221, 224 (2009) (arguing that 8 U.S.C. § 1189 does not meet procedural due process requirements).

²³⁷ 8 U.S.C. § 1189(a)(1).

²³⁸ Compare OIG, *ROLE OF WATCH LISTS*, *supra* note 43, at 9–11 (indicating that there is some criteria for including an individual on the No Fly and Selectee Lists but redacting the criteria) with 8 U.S.C. § 1189(a)(1) (providing the three required findings the Secretary must make to designate an organization FTO).

²³⁹ 8 U.S.C. § 1189(a)(3).

²⁴⁰ *See id.*

²⁴¹ *See People's Mojahedin Org. of Iran v. Dept. of State*, 182 F.3d 17, 19 (D.C. Cir. 1999) (In the FTO designation process, "there is no adversary hearing, no presentation of what courts and agencies think of as evidence, no advance notice to the entity affected by the Secretary's internal deliberations.").

²⁴² 8 U.S.C. § 1189(c)(2).

security watch-listing and redress procedures.²⁴³ Moreover, the fact that the Secretary publishes the designation of the FTO in the Federal Register also increases transparency.²⁴⁴ In contrast, the government deliberately obfuscates whether an individual is on the No Fly or Selectee Lists.²⁴⁵

Lastly, there is a certain practicality to implementing a system framed on the FTO designation system. First, a version of the FTO system has been in place for over a decade,²⁴⁶ so the executive branch has institutional knowledge about the system. It has apparently figured out how to balance its competing priorities of protecting national security and compliance with the statute.²⁴⁷ Second, the courts have dealt with the system in a number of cases, leaving a body of precedent with which to apply to future cases.²⁴⁸ However, some changes are necessary to appropriately tailor this system to the aviation watch-list setting.

C. TRANSLATING TO THE NO FLY AND SELECTEE CONTEXT

Applying the FTO statute to the No Fly and Selectee watch-listing procedures will require at least four changes. First, the timeframe for requesting the Secretary to reconsider an FTO designation is overly onerous. Designated organizations must

²⁴³ See OIG, EFFECTIVENESS OF TRIP, *supra* note 17, at 89. It is important to remember that in today's administrative state much of the way Congress controls the agencies is through process. David S. Rubenstein, "Relative Checks": Towards Optimal Control of Administrative Power, 51 WM. & MARY L. REV. 2169, 2206-07 (2010). The idea is that by requiring agencies to perform certain tasks prior to acting, the agency (or really its officials) will make more informed, and ultimately better, decisions. *Id.* It is at least arguable that additional procedures may improve the overall result of the watch-listing system by structuring those decisions to take into account pertinent information. See *id.*

²⁴⁴ See 8 U.S.C. § 1189(a)(2)(A).

²⁴⁵ OIG, EFFECTIVENESS OF TRIP, *supra* note 17, at 89.

²⁴⁶ See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Title III, § 302(a), 110 Stat. 1214 (1996) (current version at 8 U.S.C. § 1189 (2012)). This law added the FTO section to the existing statute on April 24, 1996. *Id.*

²⁴⁷ See *id.*

²⁴⁸ See, e.g., *People's Mojahedin Org. of Iran v. Dep't of State*, 613 F.3d 220, 226-28 (D.C. Cir. 2010) (holding that the Secretary of State violated the People's Mojahiden Organization of Iran's due process rights and discussing how the Secretary may satisfy them); *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 199 (D.C. Cir. 2001) ("[O]ur only function in reviewing a designation of an organization as a foreign terrorist organization 'is to decide if the Secretary, on the face of things, had enough information before her to come to the conclusion that the organizations were foreign and engaged in terrorism.'").

wait two years before requesting the initial reconsideration.²⁴⁹ In the aviation-security context, this restriction would place a great burden on the individual that has to wait for reconsideration, and it does not further the goal of improving the watch lists by removing improperly listed individuals.²⁵⁰ However, restricting subsequent reconsideration requests for a certain time period makes sense in order to cut down on administrative burden of repeated requests.

Second, the notice requirements are problematic in some contexts. For one, the current FTO statute requires one to seek judicial review of a designation within thirty days from the date of publication in the Federal Register.²⁵¹ For the vast majority of the individuals listed on the No Fly and Selectee Lists, this would likely negate any opportunity for judicial review.²⁵² Most individuals do not regularly monitor the Federal Register, and the listed individuals may have no reason to suspect their listing on a watch list during that timeframe if they do not attempt to board an airplane during that time. Either removing this limitation or extending it for a period longer than one year should suffice to overcome this issue.²⁵³ Additionally, building some flexibility into the notification requirements would address potential issues with immediate notification. There may be situations in which national security considerations outweigh the benefit of notifying the individual. For instance, the FBI argues that notifying the individuals listed on a watch list could jeopardize an ongoing investigation.²⁵⁴ Other exigent circumstances may arise in which immediate notification may frustrate national security efforts.²⁵⁵ A short delay in notifying the individual, such as 90 to 120 days, seems appropriate to handle such concerns.

Third, the government must adjust the criteria to fit the aviation security context. The current criteria generally seem appropriate,²⁵⁶ but they need tailoring. Such tailoring will reduce the likelihood of including an individual that poses no threat to aviation security on the No Fly and Selectee Lists.²⁵⁷ Fourth, for

²⁴⁹ 8 U.S.C. § 1189(a)(4)(B)(ii).

²⁵⁰ *See id.*

²⁵¹ *Id.* § 1189(c)(1).

²⁵² *See id.*

²⁵³ *See id.*

²⁵⁴ Letter from Arthur M. Cummins, II to Carlton I. Mann, *supra* note 41.

²⁵⁵ *See id.*

²⁵⁶ *See generally* 8 U.S.C. § 1189(a)(1).

²⁵⁷ *See id.*

those individuals entitled to due process protections, the TSA will likely need to modify the procedures to “provide notice of those unclassified items upon which [it] proposes to rely to the entity to be designated . . . [and] the opportunity to be heard at a meaningful time and in a meaningful manner. . . .”²⁵⁸ However, the hearing need not be the equivalent of a judicial trial; instead, the opportunity to refute the unclassified material in writing will suffice.²⁵⁹

Obviously, this is not a flawless system. However, making the suggested changes to the No Fly and Selectee Lists systems would be a meaningful and practical improvement. First, the instituting of clear criteria for listing an individual based on a reviewable administrative record will improve the efficacy issues with the current list. Such additional procedures will also improve the agencies’ decision-making by subjecting it to independent review. Second, providing notification of the facts supporting a watch list nomination to the watch-listed individual with the opportunity for that individual to confront those facts both within the agency and through judicial review increases the fairness of the watch lists significantly. Third, the publishing of the watch-list criteria, the notification of individuals on the lists, and the publicity of the redress process will add much needed transparency. Lastly, while the new process will require the government to divulge some information it currently keeps secret,²⁶⁰ it will still protect classified information.²⁶¹

VI. CONCLUSION

The current aviation-security watch-list structure needs to change. The lists impose a high burden on those individuals entangled in their web.²⁶² They deservingly entrap some individuals, but the dragnet approach currently employed also ensnares many innocent individuals, subjecting them to the same consequences.²⁶³ This approach may work to minimize the occur-

²⁵⁸ *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 209 (D.C. Cir. 2001). This court addresses, among other things, what requirements the Secretary of State must meet to satisfy the due process rights of those FTO designees entitled to such protections. *Id.* at 200–03.

²⁵⁹ *Id.*

²⁶⁰ See OIG, *ROLE OF WATCH LISTS*, *supra* note 43, at 46–53 (redacting all of the criteria for selecting individuals for the No Fly and Selectee Lists).

²⁶¹ See 8 U.S.C. § 1189(c)(2).

²⁶² See *supra* Part II.B.

²⁶³ See, e.g., *Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d 983 986, 1004–05 (9th Cir. 2012).

rence of false negatives. However, the cost of the false positives dictates a more tailored approach in line with our societal values of privacy and personal autonomy. Even though the vast majority of individuals listed on the No Fly and Selectee Lists are non-resident aliens,²⁶⁴ we as a civilized society owe these individuals an opportunity to remove the cloud from their name. The watch lists still impose a significant burden on those individuals.²⁶⁵ The story of Rahinah Ibrahim introduced in Part I illustrates the burdens these individuals endure and the lack of effective redress procedures available. Moreover, limiting the number of innocent individuals on the watch lists will improve the efficacy of these lists.²⁶⁶ Undoubtedly, erroneously including individuals on these lists distracts the government's attention from those individuals who intend to do us harm.

The courts and a number of commentators have suggested various frameworks for addressing the watch-list problem generally. Their suggestions include extending due process and other constitutional protections to certain nonresident aliens; increasing front-end efficacy; and extending the Privacy Act of 1974.²⁶⁷ Each of these suggestions is incomplete or inadequate for various reasons.²⁶⁸ This article suggests a system framed on the statute currently in place for designating FTOs.²⁶⁹ While this system is subject to criticism on due process and other grounds,²⁷⁰ it offers a practical alternative that would improve both the efficacy and fairness of the No Fly and Selectee watch-listing procedures.

However, any proposal, such as the one made in this article, about how to structure the No Fly and Selectee watch-listing procedures is necessarily incomplete. We are looking from the outside in. The government classifies much of the current watch-listing procedures and statistics.²⁷¹ The costs and the benefits are uncertain.²⁷² While 9/11 is an easy cost at which to point, the next attack almost certainly will not be in the same vein. An equally vexing problem is the benefits of the current

²⁶⁴ See *Factsheet: The ACLU's Challenge to the U.S. Government's "No Fly List"*, *supra* note 71.

²⁶⁵ See, e.g., *Ibrahim*, 669 F.3d at 986.

²⁶⁶ See *supra* Part III.A.

²⁶⁷ See *supra* Part IV.

²⁶⁸ See *id.*

²⁶⁹ See *supra* Part V.

²⁷⁰ See *id.*

²⁷¹ See Letter from Arthur M. Cummins, II to Carlton I. Mann, *supra* note 41.

²⁷² HERMAN, *supra* note 80, at 84–85.

procedures and of additional, likely more cumbersome, procedures. This incapacity is, in essence, the problem with government secrecy—it prevents the electorate from reaching a reasoned decision on an issue.²⁷³

The United States is currently in the midst of a discussion about the role of the National Security Agency in our society.²⁷⁴ While this is certainly a valid discussion to have, we should broaden the focus to address the larger issue of balancing our national security interests with our privacy and personal autonomy interests. Such a discussion would surely address, among other things, the use of the No Fly and Selectee Lists as well as the terrorist watch lists as a whole.

²⁷³ *Id.* at 43.

²⁷⁴ See Ellen Nakashima & Greg Miller, *Obama Calls for Significant Changes in Collection of Phone Records of U.S. Citizens*, WASH. POST (Jan. 17, 2013), http://www.washingtonpost.com/politics/in-speech-obama-to-call-for-restructuring-of-nsas-surveillance-program/2014/01/17/e9d5a8ba-7f6e-11e3-95c6-0a7aa80874bc_story.html.